

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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ROBERT M. GLEN,

Plaintiff,

v

TRIPADVISOR LLC, TRIPADVISOR, INC.,  
ORBITZ, LLC, TRIP NETWORK, INC. d/b/a  
CHEAPTICKETS, KAYAK SOFTWARE CORPORATION,  
and BOOKING HOLDINGS, INC.,

Defendants.

: CIVIL ACTION

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: NO. 19-1809-LPS

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ROBERT M. GLEN,

Plaintiff,

v

VISA, INC., VISA U.S.A. INC., VISA  
INTERNATIONAL SERVICE ASSOCIATION,  
MASTERCARD INCORPORATED, and  
MASTERCARD INTERNATIONAL INCORPORATED,

Defendants.

: CIVIL ACTION

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: NO. 19-1870-MN

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Wilmington, Delaware  
Thursday, December 7, 2020  
*Telephonic Motions Hearing*

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BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

APPEARANCES:

- - -

ANDREWS & SPRINGER LLC  
BY: JESSICA ZELDIN, ESQ.

and

Brian P. Gaffigan  
Official Court Reporter

1 APPEARANCES: (Continued)

2 REID COLLINS & TSAI LLP  
3 BY: CRAIG A. BONEAU, ESQ., and  
4 RYAN M. GOLDSTEIN, ESQ.  
(Austin, Texas)

5 Counsel for Robert F. Glen

6 POTTER ANDERSON & CORROON, LLP  
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9 WALDEN MACHT & HARAN, LLP  
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(New York, New York)

11 Counsel for TripAdvisor LLC and  
12 TripAdvisor, Inc.

13 MORRIS NICHOLS ARSHT & TUNNELL, LLP  
14 BY: JOHN D. DiTOMO, ESQ.

15 and

16 BAKER MCKENZIE  
17 BY: MICHAEL A. DUFFY, ESQ.  
(Chicago, Illinois)

18 Counsel for Kayak Software Corporation  
19 and Booking Holdings Inc.

20 BALLARD SPAHR LLP  
21 BY: BETH MOSKOW-SCHNOLL, ESQ.

22 and

23 SCOTT DOUGLASS & McCONNICO, LLP  
24 BY: DAVID SHANK, ESQ., and  
25 STEPHANIE KOVER, ESQ.  
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Counsel for Expedia, Inc., Expedia  
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Travelocity, Orbitz, LLC, and Trip  
Network, Inc., d/b/a Cheap Tickets

1 APPEARANCES: (Continued)

2  
3 YOUNG CONAWAY STARGATT & TAYLOR, LLP  
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5 SIDLEY AUSTIN, LLP  
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and MasterCard International  
9 Incorporated

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11 BY: BETH MOSKOW-SCHNOLL, ESQ.

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13 AKERMAN LLP,  
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15 AKERMAN LLP,  
16 BY: LORAYNE PEREZ, ESQ.  
(Miami, Florida)

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18 Counsel for Visa Inc., Visa U.S.A.  
Inc., and Visa International Service  
19 Association

20 COOCH & TAYLOR, P.A.  
21 BY: CARMELLA KEENER, ESQ.

22 and

23 DUBBIN & KRAVETZ, LLP  
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24  
25 Counsel on behalf of Amici Curiae  
Dan Burton and Robert Torricelli

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2 P R O C E E D I N G S

3 (REPORTER'S NOTE: The following telephonic oral  
4 argument was held remotely, beginning at 12:35 p.m.)

5 THE COURT: Good afternoon, everybody. This is  
6 Judge Stark. We're here in two related actions, and both of  
7 them I believe the plaintiff is the same and represented by  
8 the same counsel. Let's begin by putting your appearance on  
9 the record, please.

10 MS. ZELDIN: Thank you, Your Honor. This is  
11 Jessica Zeldin from Andrews & Springer on behalf of  
12 plaintiff Robert Glen in both of the Civil Actions. With me  
13 on the line is Craig Bono and Ryan Goldstein from Reid  
14 Collins & Tsai. Both have been admitted pro hac vice, and  
15 Mr. Bono will be making today's presentation on behalf of  
16 the plaintiffs in both cases.

17 THE COURT: Okay. That's fine. Good afternoon  
18 to all of you.

19 In the 19-1809 action, who is there for the  
20 TripAdvisor defendants, please?

21 MR. CHOA: Good afternoon, Your Honor. This  
22 is Jonathan Choa from Potter Anderson. And with me is  
23 co-counsel, Jacob Gardener from Walden Macht & Haran.

24 MR. GARDENER: Good afternoon, Your Honor.

25 THE COURT: Good afternoon. And in that same

1 action, who is there for the other defendants -- well,  
2 actually for the Kayak and Booking defendants, please.

3 MR. DiTOMO: Good afternoon, Your Honor. This  
4 is John DiTomo at Morris Nichols Arsht & Tunnell. And with  
5 me on the line is my colleague, Michael Duffy.

6 MR. DUFFY: Good afternoon.

7 THE COURT: Yes. State your colleague's name  
8 again, please?

9 MR. DiTOMO: Michael Duffy.

10 THE COURT: Duffy. Okay. Yes, good afternoon  
11 to you both.

12 MR. DUFFY: Good afternoon. It's Michael Duffy.

13 Just so the Court is aware, the defendants  
14 have decided in both cases that I would be making one  
15 presentation because the arguments are the same, and then  
16 there will be rebuttal if the Court allows it, but I just  
17 want to let the Court know that we decided to make this  
18 less of a multiparty show, so to speak. So I will be making  
19 the primary presentation. This is Mr. Duffy from Baker  
20 McKenzie.

21 THE COURT: Okay. I appreciate that. Thank you  
22 very much.

23 And in this same action, who is there for the  
24 remaining defendants, please?

25 MS. MOSKOW-SCHNOLL: Hi, Your Honor. It's Beth

1 Moskow-Schnoll from Ballard Spahr. And with me is David  
2 Shank, and Stephanie Kover of Scott Douglass McConnico. And  
3 we represent the Expedia entities. And if the Court allows,  
4 David Shank will be making the rebuttal argument on behalf  
5 of all the defendants.

6 THE COURT: Okay. Thank you. Good morning to  
7 all of you.

8 In the 19-1870 case, who is there for the  
9 MasterCard defendants, please?

10 MR. NEIBURG: Good afternoon, Your Honor. It's  
11 Michael Neiburg from Young Conaway, joined by co-counsel  
12 Sidley Austin, David McAloon and Kwaku Akowuah.

13 THE COURT: Okay. Good afternoon to you all.

14 And finally I think it is for the Visa  
15 defendants, please.

16 MS. MOSKOW-SCHNOLL: Your Honor, it's Beth  
17 Moskow-Schnoll from Ballard Spahr again. And with me are  
18 Martin Domb and Lorayne Perez of Akerman on behalf of Visa.

19 THE COURT: Okay. Good afternoon to you as well.

20 My court reporter should be on the line. And  
21 for the record, as I said it is two related cases. Both  
22 involve the plaintiff Robert M. Glen. In the first action,  
23 it is versus TripAdvisor, LLC, et al, and that is Civil  
24 Action No. 18-1809-LPS. In the second action, it is  
25 Robert M. Glen versus Visa Inc., et al, Civil Action No.

1 19-1870-LPS. And this is the time we set for argument on  
2 the various motions to dismiss, which raised a number of  
3 issues.

4 If I understood correctly but I do want to  
5 confirm, the way the defendants propose to proceed is that  
6 we would hear from Mr. Duffy first on all the motions and  
7 whatever arguments the defendants want to be heard on, then  
8 we would turn it over to plaintiff, and then we would hear I  
9 think from Mr. Shank as rebuttal on behalf of all of the  
10 defendants.

11 Mr. Duffy, is that what the defendants propose?

12 MR. DUFFY: It is, Your Honor, with one caveat.  
13 To the extent that the MasterCard and Visa defendants wish  
14 to, you know, make any extra points, Mr. Shank and I have  
15 agreed we will use our a little bit of extra time at the end  
16 his rebuttal, but that is how it is going to proceed if the  
17 Court is okay with that.

18 THE COURT: Okay.

19 MS. KEENER: Good afternoon.

20 THE COURT: Yes, go ahead.

21 MS. KEENER: I'm sorry. Good afternoon. This  
22 is Carmella Kenner of Cooch & Taylor, and I filed papers  
23 on behalf of the amici curiae, Dan Burton and Robert  
24 Torricelli. I just wanted to let Your Honor know that I am  
25 on the line with my co-counsel, Samuel Dubbin of Dubbin &

1 Kravetz. And Mr. Dubbin has reserved some time out of  
2 the plaintiff's allotment I believe and will make the  
3 presentation on behalf of Mr. Burton and Mr. Torricelli  
4 today.

5 THE COURT: Okay. Thank you for that. I  
6 apologize for my oversight and good afternoon to both of  
7 you.

8 MR. DUBBIN: Good afternoon, Your Honor.

9 THE COURT: Good afternoon, Mr. Dubbin.

10 Mr. Boneau, I believe you are going to be doing  
11 the main argument for plaintiff. Do you have any objection  
12 to what the defendants have proposed?

13 MR. BONEAU: I don't, Your Honor. That sounds  
14 fine with plaintiff.

15 THE COURT: All right. Then we'll proceed as  
16 has been outlined subject to your time limits.

17 So, Mr. Duffy, you will be up first.

18 MR. DUFFY: Thank you, Your Honor. And may it  
19 please the Court.

20 In this case, the plaintiff has filed several  
21 different lawsuits all over the country alleging purported  
22 violations of the Helms-Burton act. Those cases have either  
23 voluntarily or involuntarily been dismissed such that we are  
24 down to two actual cases that remain.

25 And I think as the correspondence indicates, the



1 defendants are firmly of the belief that, and the law  
2 makes it clear that one of the cases that plaintiff elected  
3 to file, the Glen vs. American Airlines case precludes  
4 plaintiff from pursuing this action.

5 The American Airlines case is related to the same  
6 hotel, the same exact hotels filed by the same plaintiffs.  
7 It contains identical issues of inheritance and perhaps most  
8 importantly for purposes of collaterals estoppel, that case  
9 also alleges the same injury, which is to say, plaintiff's  
10 alleged injury in the American Airlines case was derived  
11 from alleged trafficking, which is to say American Airlines  
12 placement of reservations in subject hotels and earning  
13 commissions therefrom. Those issues with respect to standing  
14 are identical to what has been presented in this case by  
15 plaintiff.

16 THE COURT: Now, couldn't it at least be  
17 possible that it is slightly different? That, you know, a  
18 travel agency or somebody involved in various steps with  
19 booking, is it materially different position in terms of  
20 causing injury than an airline that flies you to Cuba?

21 MR. DUFFY: Well, in this case, Your Honor, I  
22 think the answer is no. And I think I'm uniquely qualified  
23 here because American Airlines system was literally placing,  
24 placing reservations at the subject hotels, meaning it  
25 would allow travelers to actually book reservations using a

1 platform that was designed by another online travel service  
2 provider. So the actual injury is the same. It is the  
3 booking of reservations in the subject hotels.

4 And I think what is critical here is the  
5 plaintiff, to its credit, does not dispute that. The  
6 plaintiff does say that the issues are not identical with  
7 respect to scienter and lawful travel, but with respect to  
8 the underlying issue which is raised by standing, which is,  
9 is there an injury? The injury that is alleged is the same  
10 with respect to both cases, as is the plaintiff, as are the  
11 hotels.

12 And what plaintiff says is, he doesn't endeavor  
13 to distinguish those critical factors. He says that the  
14 Texas court got it wrong and invites this Court to basically  
15 review these same factual issues which were decided by the  
16 Texas court on its own accord and make its own determination.

17 The problem is in doing so, the plaintiff  
18 invites this Court to engage in what is effectively a  
19 collateral review of a sister District Court's factual  
20 determinations.

21 Now, all of the elements of collateral estoppel  
22 have been met here. The issue was litigated. As I'd said,  
23 the issues are identical. The same counsel was present.  
24 The counsel that is on the line very ably represented  
25 Mr. Glen in Texas. And the issue was necessary to the

1 disposition of the Glen case.

2 And there really is no response on those points  
3 with respect to standing other than, you know, Your Honor,  
4 you should take a second crack at this because we believe  
5 Texas got it wrong.

6 THE COURT: Well, yes. Unless there has been  
7 development, my understanding is that case is on appeal. Is  
8 that right?

9 MR. DUFFY: That's correct, Your Honor. That's  
10 correct. But for purposes of collateral estoppel, one of  
11 the cases on appeal doesn't matter. It does not make the  
12 decision of the Court in Texas any less final and any less  
13 appealable. It is a final order.

14 THE COURT: Under Third Circuit law, my  
15 understanding was I have to make a determination as to  
16 whether the Texas decision is sufficiently firm. And one  
17 of the factors in deciding that when the case is on appeal,  
18 which it is, is whether the litigation of the issue has  
19 reached such a stage that I see no really good reason for  
20 permitting it to be litigated again.

21 Do you agree that that's part of the standard I  
22 have to apply? And if I do, then given that numerous courts  
23 have now addressed the standing question and not agreed  
24 with the Texas court, shouldn't I say that this issue hasn't  
25 reached the point where there is really no good reason to

1 keep litigating it?

2 MR. DUFFY: Well, I do agree that that's part  
3 of the standard that the Court has to consider. And I think  
4 if the Court is inclined to wait until the Fifth Circuit  
5 decides, that is obviously within the Court's discretion,  
6 and we would counsel the court rather than to rule on the  
7 same facts differently than the Court in Texas, to hold the  
8 matter in abeyance or stay this matter, dismiss it with  
9 leave to refile pending resolution by the Fifth Circuit.

10 But the fact of the matter remains if the Court  
11 were to issue a different decision, we would have competing  
12 or possibly competing or dueling decisions going throughout  
13 the federal system, one through the Fifth Circuit and one,  
14 you know, we could have a totally different outcomes,  
15 which would be both inefficient and I think, you know,  
16 it's violative of the whole tenant, the whole purpose of  
17 collateral estoppel.

18 THE COURT: I'm sorry. So there are numerous  
19 other District of Florida cases. Did none of them already  
20 create that situation?

21 MR. DUFFY: Well, those cases are not the same  
22 hotels. The unique thing here, Your Honor, is we have the  
23 exact same hotels, the exact same plaintiff, the exact same  
24 inheritance date, the exact same allegation of injury.

25 We have no other situation where you have two

1 separate federal courts opining on the same identical  
2 issues. And that is essentially what the two Glen matters  
3 present. And this is a result of the litigation strategy  
4 pursued by plaintiff, but plaintiff has elected to pursue  
5 its claims related to the same properties in different  
6 courts throughout the country. And this is a problem that  
7 has been created by that strategy.

8 But unlike the federal decisions in Florida  
9 which have rendered decisions on the standing, this is  
10 unique. This is a situation where if the Court were to  
11 weigh in, you would essentially be doing so as really  
12 reviewing what has already been reviewed by the Court in  
13 Texas.

14 But even if this Court were to disagree and  
15 were to say, you know, I don't think there is collateral  
16 estoppel here, I don't think the issues are the same, I  
17 don't think there is an identity of fact. All of those  
18 issue, even if the Court were to look past collateral  
19 estoppel, this case should still be dismissed for I think  
20 the singular reason that plaintiff, by his own admission,  
21 admits that he inherited or came into possession of his  
22 claim after the statutory bar date.

23 Now, every single federal case that has  
24 considered this issue, i.e., where a plaintiff has come into  
25 possession, through inheritance, by the way, of his or her

1 claim to a subject property after March 12th, 1996, those  
2 cases have been dismissed. And we have cited those in our  
3 pleadings.

4 And I will note that additional authority from  
5 the Southern District of Florida has come out following that  
6 same precedent.

7 And in response to that precedent, in response  
8 to the plain language argument about the statute, what  
9 plaintiff does is engage in what I would describe as a very,  
10 very strained interpretation of what "acquires" means. And  
11 under plaintiff's theory, "acquires" doesn't mean "inherited."

12 THE COURT: Right.

13 MR. DUFFY: That somehow --

14 THE COURT: But help me on this.

15 MR. DUFFY: Of course.

16 THE COURT: He also makes the argument that your  
17 view, which I recognize other courts have agreed with, but  
18 that that interpretation leads to absurd results that it's  
19 clear Congress did not intend. Tell me why that is not the  
20 case.

21 MR. DUFFY: Well, of course. To me, if you  
22 look -- and to this point I'm going to refer briefly to the  
23 amici. If you look briefly at what Congress intended, there  
24 is no language that has been cited that showed when Congress  
25 put that date in the statute, the March 12th, 1996 date,

1 that they intended to create an exception for inherited  
2 property. To the contrary, there is really nothing in the  
3 legislative history that has been cited lavishly that says  
4 that there was an exception for inherited property.

5 What is clear is Congress intended the  
6 March 12th, 1996 date to be an infliction point. That  
7 property confiscated after that point could not be, could  
8 not be redressed. And similarly for those individuals who  
9 came into possession of their claim after that point, they  
10 could not, through acquisition or through other means,  
11 could not seek redress.

12 Now, the reason for that is clear. Congress  
13 wanted to state a point in time, a fixed point in time  
14 whereby individuals could or could not pursue their claims.

15 Now, plaintiff's point about absurdity I frankly  
16 don't understand. I mean the fact of the matter is Congress  
17 can set a point, a fixed point whereby an individual may or  
18 must bring, must file suit. Taking plaintiff's argument to  
19 its logical conclusion, there is really no limitation on  
20 when a plaintiff who comes into possession through  
21 inheritance of his claims can bring suit.

22 I mean you can see grandchildren, great  
23 grandchildren, great-great grandchildren, all the way out  
24 years and years into the future where there is no effective  
25 statute of limitations if you take what is plaintiff's

1 argument, if inheritance is to be read out of the definition  
2 of "acquire."

3 And I would add that literally no authority,  
4 no authority that has looked at this exact question has  
5 followed the argument that plaintiff asserts.

6 THE COURT: They suggest some of them have  
7 considered expressly the "absurdity of results" argument.  
8 Is that true or not true?

9 MR. DUFFY: You know, I have not been present  
10 for all of the oral arguments, Your Honor. I represent my  
11 clients in a number of these. I can tell you the arguments  
12 were made orally about this absurdity, but the inheritance  
13 as opposed to acquire, I can't represent to the Court that  
14 it has never been considered. At least in the cases thus  
15 far, no one has made the argument, to my knowledge.

16 THE COURT: Talk about the distinction between,  
17 we're talking about 6082(a)(4)(B), and then there is (C)  
18 which applies to property confiscated after March of 1996.

19 The plaintiff believed that your position --  
20 he says defendants so forgive me if defendants disagree on  
21 this. I don't recall. But he says that defendants agree  
22 that Glen would not be barred if he had acquired his  
23 interest by inheritance after March of 1996. Is that true?  
24 And if so, why would that not be an arbitrary or absurd  
25 result?



1 MR. DUFFY: I don't think that is the case. I  
2 mean our view is if he has not acquired his claim by  
3 March 12th of 1996, he is barred. He is barred, period.

4 THE COURT: Right. I'm sorry. I wasn't clear.  
5 If the property had been confiscated after March of 1996 and  
6 then he had acquired his interest by inheritance. In that  
7 circumstance, do you take the view that subsection C would  
8 bar his claim?

9 MR. DUFFY: Yes, yes, yes. No, that has never  
10 been tested, but that would by our understanding, yes.

11 THE COURT: Okay. So he would be barred either  
12 way. All right.

13 MR. DUFFY: That's right.

14 THE COURT: He asks, along the same vein, why  
15 should an inherited claim that is actionable if the original  
16 property owner died in 1995 suddenly become unactionable if  
17 the same property owner dies in 1997? What is the response  
18 to that?

19 MR. DUFFY: The response is Congress fixed a  
20 date for a reason. I mean, you know, it may seem arbitrary  
21 to plaintiff, but the date meant something to Congress, and  
22 Congress decided it. Congress makes all sorts of decisions,  
23 you know, fixing a point in time where parties can exercise  
24 substantive rights.

25 And, you know, it may be an unfortunate thing in

1 terms of timing, but it is Congress who seeks that date and  
2 elevated its importance and put it into the statute. And  
3 the language of the statute is clear. That the acquisition  
4 must be before March 12th of 1996.

5 And the idea that one cannot acquire property  
6 through inheritance, I have looked at this issue now in  
7 preparing for the oral argument because it is interesting.  
8 I don't think I have seen a single case that says  
9 acquisition necessarily does not mean inheritance. People  
10 acquire or obtain property through inheritance all the time.

11 So while the plaintiff may believe it is unfair  
12 or arbitrary, that is a congressional decision, and Congress  
13 obviously believed that this date was important because they  
14 put it into the statute at several places.

15 THE COURT: Now, I'm sure I will get the  
16 same answer but let me ask nonetheless. Glen directs me  
17 to section 6082(a)(5)(C) which evidently was a two year  
18 suspension of lawsuits based on uncertified claims which  
19 would have barred suit under Title III for two years from  
20 March 1996 even had the President not, you know, triggered  
21 the exceptions. And he says that just is further evidence  
22 of the assert absurdity of your position because a certain  
23 number of claims would have been extinguished in those two  
24 years and, you know, how could Congress have intended that?

25 Anything to add on that one?

1 MR. DUFFY: No, I think the argument remains the  
2 same is that the date is in the statute for a reason. And  
3 it is clear that it is a demarcation point in the statute.  
4 And I think the answer remains the same, Your Honor. The  
5 answer remains the same.

6 I'm happy to discuss with the Court our  
7 arguments on constitutional standing, if the Court would  
8 like me to. The view here, which I think has been  
9 articulated by the Court in Texas and others, is in this  
10 case where the plaintiff at the time did not have an  
11 interest in the property, it is difficult to articulate  
12 what his injury is. His injury is basically, if he was  
13 restored to where he was status quo ante, he had no right to  
14 the proceeds of any reservations in place in these hotels.  
15 This is the classic example of a statutory right that really  
16 exceeds the bounds of constitutional standing.

17 Now, I recognize that I've told the Court that  
18 it is collaterally estopped from looking at the standing  
19 issue. We believe it was readily decided in Texas, but  
20 there are a myriad of other reasons why, in addition to the  
21 statutory bar date and standing, why this Court can and  
22 should dismiss Mr. Glen's case.

23 The first of which is it is clear from the  
24 statute that there is a scienter requirement. It's clear.  
25 And Mr. Glen has not pled a knowing or intentional

1       trafficking in the subject properties, despite three  
2       attempts to do so.

3               And words matter. And Mr. Glen has never pled  
4       adequately, much less with specificity, that my clients and  
5       the other defendants on the line knowingly trafficked in  
6       these properties. And there is ample authority out there,  
7       albeit it is not in the majority but there is authority out  
8       there that the scienter requirement means something. And it  
9       has to be pled with some level of specificity in order to  
10      meet the pleadings standard.

11             THE COURT: All right. Focus, if you would, on  
12      the period after you all got these notices, that I think  
13      it's at least plausible to assume, expressly put you all on  
14      notice that these properties were confiscated. Why has he  
15      not met the scienter standard even on your reading of the  
16      statute for at least the period from the date you got those  
17      notices?

18             MR. DUFFY: Well, I think looking at those you  
19      have to conflate what is the exception for lawful travel.  
20      That all of the defendants on the phone, and particularly I  
21      know for a fact mine as well, have very carefully, working  
22      with professionals, been careful to make sure that anyone  
23      who travels to Cuba does so lawfully or books a reservation,  
24      does so lawfully.

25             And so the idea that plaintiff can make an

1     assertion in a letter that these properties were, you know,  
2     confiscated and, ergo, that immediately satisfies the  
3     scienter requirement that we are knowingly trafficking  
4     conflicts with the language of the statute which creates an  
5     exemption for lawful travel.

6             And that's a part of our pleading here, that  
7     plaintiff cannot defeat the lawful travel exception which  
8     is created in the statute. And I think when you look at  
9     the "knowing" requirement of the statute and then you look  
10    at what's the exception "created by lawful travel," it's  
11    clear that the mere sending of a letter restating an  
12    accusation that we're trafficking isn't enough to establish  
13    scienter at least with the specificity that is normally  
14    required.

15            THE COURT: If there is one defendant, I think  
16    it was maybe Visa, that evidently contends that it changed  
17    its behavior in response to the notice letter, how do I  
18    factor that into the analysis?

19            MR. DUFFY: Well, I think -- well, I'll let  
20    Visa counsel address that, Your Honor, after rebuttal.  
21    But I think the answer is Visa elected to change its  
22    behavior evaluating what potential risks were. That does  
23    not mean that the other defendants, who looked at the lawful  
24    exceptions, worked very carefully to make sure they adhered  
25    with it, were somehow knowingly trafficking in the purported

1 properties.

2 So I think it may be relevant. Visa evaluated  
3 its litigation risks or made other considerations and Visa  
4 can address that in the rebuttal, but with respect to those  
5 entities that did not change the reservations or change  
6 their pattern of reservations in the subject hotels, they  
7 didn't do so because the statute creates a safe harbor  
8 for them. And so if you can simply allege that you are  
9 trafficking and that is enough to satisfy the heightened  
10 standard of knowing and intentional behavior, I would think  
11 it would render the safe harbor null and void.

12 Briefly, Your Honor, on the amici. We say in  
13 our opposition papers that we don't believe the Court should  
14 consider the briefs, but if the Court does, I would note  
15 particularly with respect to whether "acquire" means  
16 "inherit."

17 In several pages of citations to the  
18 Congressional record, so there is literally not one  
19 reference to inherited property being different from  
20 acquired property or some sort of nuance, an acquisition is  
21 different from inheritance. What you see is there is ample  
22 citation that the drafters of this legislation intended to  
23 deter trafficking.

24 Well, that doesn't address the issue at hand  
25 for the Court. And so we all recognize here that the

1 Helms-Burton legislation came out of a climate where the  
2 Congress and others wanted to make sure that individuals  
3 were not trafficking unlawfully in property that had been  
4 confiscated, but that does not address the central issues  
5 here, which is what is the purpose of the March 12th, 1996  
6 date, and what is the purpose of the language that one  
7 cannot bring a claim unless the national acquires ownership  
8 of the claim before March 12th, 1996.

9 So in our view, while the citation to the  
10 legislative history may be interesting for the overall  
11 intent behind the statute, it's irrelevant to the question  
12 that is being put before the Court today.

13 THE COURT: Is the defendants' view that the  
14 legislation history is completely silent on inheritance?

15 MR. DUFFY: Well, at least I have -- and  
16 admittedly, Your Honor, I have not reviewed the entirety of  
17 the legislative history. I have looked at what has been  
18 cited by the amici as well as by plaintiff, and I have not  
19 been able to find any basis in the legislative history  
20 that it would make plain that the black letter definition of  
21 "acquire" should somehow strike out "inherit" from it.

22 So that's a qualified answer to say I haven't  
23 read the entirety of the legislative history, I have not,  
24 but I have seen what seen and what has been cited does not  
25 advance the ball proverbially as the plaintiffs in the amici

1 claim.

2 Your Honor, one last point, and I know you  
3 raised it early on.

4 To the extent the Court is conflicted whether to  
5 preclude plaintiff from advancing this case, based upon the  
6 Texas actions, you know, the defendants are aware that there  
7 are other considerations, particularly the finality of that  
8 Texas case; and we would during the court to either, one,  
9 dismiss the case without prejudice or to hold the case in  
10 abeyance until such time that the Fifth Circuit clarified  
11 the issue.

12 If there are no further questions, Your Honor,  
13 I'm happy to field them or answer additional questions.  
14 We'll defer our time for rebuttal and for Mr. Shank and for  
15 anyone from MasterCard or Visa.

16 THE COURT: Just a few more questions. Thank  
17 you.

18 On the lawful travel exception or carveout from  
19 trafficking, the debate seems to be largely on whether who  
20 has the burden on this, and whether the plaintiff has to  
21 plead around it, and ultimately if the case went forward,  
22 who would have to prove that the travel was lawful or not  
23 lawful.

24 Help me. What is the best argument for your  
25 view?



1 MR. DUFFY: Well, you know, Your Honor, I  
2 recognize that there is authority that is going against us  
3 here that basically says that whether traffic is lawful is  
4 an affirmative defense.

5 Our view is that it is an element of the claim.  
6 That there is a carveout for lawful travel, and it is  
7 incumbent upon the plaintiff to demonstrate that this lawful  
8 travel exception should not apply.

9 So we cite this. We cite that authority in our  
10 papers. I recognize that there is conflicting authority  
11 that goes the other way. I think it makes much more sense  
12 if the plaintiff is required to plead particularly given the  
13 scienter requirement of the statute.

14 THE COURT: I'm sorry. You got interrupted  
15 there. Repeat that last sentence, please.

16 MR. DUFFY: I think particularly given the  
17 scienter requirement in the statute. When you read those  
18 two together, I think it makes clear that it is a burden on  
19 the plaintiff to prove, one, that the violation, the traffic  
20 was knowing and intentional and, two, that it isn't lawful.  
21 That it wasn't lawful travel. So I think when you read  
22 those two components of the statute together, it is the  
23 plaintiff's burden.

24 THE COURT: Okay. And then, just going back  
25 to constitutional standing and injury for a second.

1                   If the claim could be acquired by inheritance,  
2                   would the injury that the plaintiff's I think the aunt and  
3                   mother suffered, would that injury pass with the claim  
4                   through inheritance?

5                   MR. DUFFY: To me, the answer I think is no.  
6                   The injury I think necessarily is to the individual or  
7                   individuals who had ownership in the property who had the  
8                   property stripped from them. Okay?

9                   To the extent that the claim was acquired  
10                  and ownership of the property was never obtained by those  
11                  individuals, I don't think that they can subsequently  
12                  acquire a right to an injury that didn't exist or that  
13                  didn't exist at the time, if that makes sense.

14                  I don't think the injury travels with the  
15                  subsequent inheritors or acquirers of the claim itself.  
16                  It's just too attenuated.

17                  I mean the analogy, the analogy I like to think  
18                  about, Your Honor, if you own a watch and you have a son,  
19                  your son may have an inherited interest in that watch and  
20                  that watch is stolen from you and is subsequently sold.  
21                  Your son, though he has, you know, has an inherited or a  
22                  vested interest in that watch doesn't have the ability to  
23                  pursue a claim, to seek redress for it. He doesn't. You  
24                  do. And the injury related to a subsequent sale of that  
25                  watch never attorns to the heir to that watch.

1                   And I think that that's a useful way to think  
2                   about that. These hotels were confiscated from their  
3                   owners. The heirs may have had a vested remainder or  
4                   potential interest in those hotels, albeit, you know, they  
5                   never fully vested, but they cannot pursue an injury related  
6                   to the subsequent sale, at least as I think of injury in  
7                   fact under the constitutional standing requirement.

8                   THE COURT: Okay. Thank you. You have answered  
9                   my questions for now. Thank you very much.

10                  Whoever is up next may proceed.

11                  MR. BONEAU: Thank you, Your Honor. This is  
12                  Craig Boneau from Reid Collin for plaintiff. Good  
13                  afternoon.

14                  I want to start with addressing an issue that  
15                  defendants sort of referenced a couple times about the  
16                  litigation strategy of plaintiff, not because I think it is  
17                  necessarily important to the issues at hand, but it does --  
18                  it sort of colors all of the issues that are presented,  
19                  particularly the collateral estoppel issue.

20                  So, the defendants at least implied that  
21                  plaintiff's filing of suits in different jurisdictions  
22                  across the country was really an attempt to get different  
23                  jurisdictions to decide the issue in the hope at least one  
24                  of them would go plaintiff's way.

25                  That is not at all what occurred. Instead, the

1 reason plaintiff filed suits in various jurisdictions as  
2 defendants well know because they were participated,  
3 participated in bringing most of those cases into Delaware  
4 was because personal jurisdiction could only be obtained in  
5 particular jurisdictions across the country because of the  
6 way jurisdiction and general jurisdiction has evolved over  
7 the recent years.

8 So a number of plaintiffs or a number of  
9 defendants could only be sued in Nevada, for example, or in  
10 Washington state, for example, and not in Delaware.

11 Ultimately, the reason that the majority of these  
12 cases are in Delaware is because many of the defendants were  
13 incorporated in Delaware, thereby subjecting them to personal  
14 jurisdiction there, and the ones that were Expedia entities  
15 that sort of live under the Expedia umbrella, and Expedia  
16 agreed to waive a personal jurisdiction defense in Delaware  
17 for those entities, so that all of their companies could be  
18 sued in one location, thereby having a more efficient means of  
19 litigating the case. So I just want to address that issue.

20 And to the extent that I know in the beginning  
21 Mr. Duffy referenced that almost all of plaintiffs' cases  
22 have been voluntarily or involuntarily dismissed, to be clear,  
23 the voluntary dismissals there were on agreement so that we  
24 could have all of these cases in one location and have an  
25 efficient litigation versus having litigations spanning the

1 entire country.

2 So I just wanted to address that on the outset.

3 THE COURT: I appreciate that. And that is the  
4 status there are no other cases at this point with your  
5 client pending in District Courts? And I'm aware of the one  
6 appeal from Texas. I don't know if there are there are any  
7 appeals from Florida.

8 MR. BONEAU: No, that's right, Your Honor. The  
9 appeal from Texas was actually filed in Florida against  
10 American Airlines.

11 And then American won a forum non-battle to have  
12 it sent to the Northern District of Texas, and so that one  
13 got transferred into the Northern District of Texas. But  
14 that was the only other case in any District Court other  
15 than the two cases that you have before yourself. So that  
16 is it.

17 THE COURT: Okay. Great. Thank you.

18 MR. BONEAU: Thank you.

19 Okay. The other thing I would like to -- you  
20 know, I know that we, that defendants talk a lot about it  
21 and for reasons that make sense, the Court is focused on  
22 some of the intricacies and nuances of the statute in  
23 deciding these, the motions at hand and in discussing those  
24 motions. But I think it is important to realize that what  
25 we have here is we have an individual -- the plaintiff isn't

1 some person who is completely attenuated from this property  
2 in Cuba, that has no interest in it, that is, you know, as  
3 my counterparty mentioned, three series of inheritances away  
4 from the property. This is an individual who played at this  
5 property as a child, who has memories of this piece of  
6 property that didn't have hotels on it. It was just a piece  
7 of beachfront property that his family -- or a series of  
8 beachfront properties, I suppose, that his family owned  
9 through generations that ultimately was taken from his  
10 family by the Castro regime.

11 And although at the time it was taken, his  
12 mother and his aunt owned the property, it was a part of  
13 his childhood. It is a part of his childhood that he still  
14 remembers to this day.

15 So I wanted to make the point that this isn't  
16 some many, many steps removed attenuated situation. We  
17 are really talking about an individual who remembers the  
18 property and certainly feels the sense of loss as a result  
19 of the property having been taken from his family.

20 On the collateral estoppel issue, the Court  
21 really asks, you know, what I would say are important  
22 questions.

23 In your normal situation for collateral  
24 estoppel, the policy is a good one whereby you don't want  
25 to -- and defendants I think cited to some of these cases,

1     you don't want a plaintiff to go lose a case and then file  
2     the same case against the same defendants in an effort to,  
3     quote-unquote, "have a rematch" wherein the same issues are  
4     litigated again in an attempt to try to just get a different  
5     outcome. That is an inefficient use of judicial resources.  
6     It's an efficient use of defense resources. It is harassing.  
7     Those are the types of things that collateral estoppel are  
8     designed to protect against. This is affirmably not this  
9     case.

10           The Booking Agency case that is before Your  
11     Honor was filed the same day as the American Airlines case  
12     was filed. And the credit card case that's before Your  
13     Honor was filed a week or so afterwards. So effectively all  
14     of these cases were filed simultaneously.

15           The Northern District of Texas case was  
16     decided first is just a matter of happenstance. It's not a  
17     situation where Mr. Glen went to the Northern District of  
18     Texas and sued these defendants and lost and then decided  
19     to go to Delaware to try to sue these defendants again in a  
20     different jurisdiction in the hope that the Third Circuit  
21     would look at it differently than what the Fifth Circuit  
22     look at it as. That is not what we have here.

23           So for that reason alone, this Court should make  
24     its own determination particularly given when we're talking  
25     about subject matter jurisdiction.

1           The Court in Texas didn't weigh all the facts on  
2           the merits in this case. The Court in Texas decided at the  
3           outset that it didn't have subject matter jurisdiction so  
4           it couldn't decide the case and then it did go on in dicta  
5           to make some other findings that certainly are subject to  
6           collateral estoppel. And I don't think at least today that  
7           the defendants even argued that they were.

8           And then in addition to -- I'm sorry. Did you  
9           have a question, Your Honor?

10          THE COURT: Not yet, but go ahead.

11          MR. BONEAU: Okay. Sorry. Yes. So in  
12          addition, under Third Circuit law, there is an exception  
13          even whenever collateral -- the sort of elements of  
14          collateral estoppels are met, there is still an exception.  
15          If sort of the landscape of the law has changed or as Your  
16          Honor pointed out, there is not a firmness to it.

17          And here, whenever the Northern District of  
18          Texas case was decided against Mr. Glen, that was literally  
19          the first case in the history of U.S. jurisprudence under  
20          Helms-Burton to determine the standing, the Article III  
21          standing issue.

22          Since then, every other court -- and admittedly  
23          there is not a lot of them because these cases have only  
24          been going on for a small period of time, but every other  
25          court that has decided the issue has gone the other



1 direction, and has rejected either explicitly or implicitly  
2 the Northern District of Texas's approach to the Article III  
3 standing.

4 So given this is not a case where Mr. Glen is  
5 not really taking a second bite at the Apple, that the  
6 Northern District of Texas decision just happened to be  
7 faster than the Delaware court's decision, and because the  
8 landscape really has changed because when it was decided  
9 there was no landscape when the Northern District of Texas  
10 decided it, and subsequently there is at least some  
11 landscape and all of that landscape has gone in the other  
12 direction, it makes the most sense for this Court to go  
13 ahead and make its own determination as to the Article III  
14 standing and then subsequently the merits of the case versus  
15 just relying on what the Northern District of Texas did.

16 THE COURT: All right. Now, I do have questions  
17 on collateral estoppel.

18 MR. BONEAU: Okay.

19 THE COURT: Is that the situation I have here?  
20 Do you concede that the four elements of collateral estoppel  
21 are met?

22 MR. BONEAU: I don't, Your Honor. In  
23 particular, the facts really are slightly different. One  
24 which is the largest fact that is different between the  
25 two situations is that here, you have trafficking that

1 was -- that, as alleged, trafficking continued after the  
2 notice letters were provided, except for possibly Visa who  
3 at least has asserted that they pulled the plug on the  
4 trafficking once they received the notice letter.

5 All the remaining defendants, none of them  
6 have told us, and certainly we pleaded that they continued  
7 to do the -- the conduct that we allege is trafficking, they  
8 continued that after the notice letters.

9 In the American Airlines situation, the Court  
10 held because -- so I should take a brief step back.

11 In American Airlines, there was a slight amount  
12 of discovery done in Florida because the Court there, there  
13 was a jurisdictional fight, personal jurisdiction fight  
14 in Florida because American Airlines is incorporated in  
15 Delaware and its present place of business is in Texas, and  
16 plaintiffs alleged specific jurisdiction over them in  
17 Florida.

18 So there was a jurisdictional fight and the  
19 Court allowed for jurisdictional discovery. And in the  
20 process of jurisdictional discovery, plaintiff there  
21 obtained information about what bookings occurred through  
22 the American Airlines system. And there were no bookings  
23 that occurred after the notice letter was received.

24 So the Court in Texas determined that as a  
25 result of no bookings having occurred, there was no

1       trafficking that occurred after the notice letter, that  
2       that was part of the Court's decision and part of the facts  
3       in that case.

4               Those aren't the facts in this case, and that  
5       makes the two cases different.

6               THE COURT:   How about the injury?   I think  
7       Mr. Duffy told us that you agree that the injury is the same  
8       as in the American Airlines case.   Is that correct?

9               MR. BONEAU:   So with regards to the Booking  
10      Agency case, the injuries are -- all of the injuries both  
11      in the American Airlines case and in this case relate to  
12      online booking agencies profiting from and allowing booking  
13      at the hotels that were built on Mr. Glen's family's  
14      property.   That is correct.

15              In the credit card case, that is a little bit  
16      different.   That isn't about booking.   The trafficking there  
17      is with regards to the use of the credit cards at the  
18      subject hotels.   So I would say I agree with Mr. Duffy to  
19      the extent we're talking about the booking agency case, but  
20      I would disagree with regards to the credit cards because  
21      that is really a separate issue.

22              THE COURT:   And with respect to collateral  
23      estoppel, what the defendants I think today are saying is  
24      perhaps the right course of action is that I just stay or,  
25      you know, hold in abeyance these motions and see what the

1 Fifth Circuit decides. Would that be prejudicial to your  
2 client? If so, how? And are there any other reasons you  
3 would oppose what the defendants are now suggesting?

4 MR. BONEAU: I think the answer is, I don't  
5 know that it would be prejudicial other than it would  
6 further delay the ultimate resolution of these cases, which  
7 we would prefer to move on and continue the process rather  
8 than have this case stayed pending the Fifth Circuit.

9 The other issue is that just regardless of  
10 what the Fifth Circuit says, I'm not sure what the Fifth  
11 Circuit's decision is necessarily determines what this  
12 Court should do and whether this Court should make its own  
13 determination particularly if it is related to the Article  
14 III standing issue.

15 Because as Your Honor noted earlier, regardless  
16 of what happens with this case, the Eleventh Circuit  
17 currently, unless it goes the other direction from what the  
18 District Courts have there done, there is already in effect  
19 a Circuit split on Article III standing. There is no  
20 meaningful differences between the analysis that the  
21 American Airlines court did and what the Southern District  
22 of Florida did. In fact, the Southern District of Florida  
23 just explicitly rejected the analysis that the Northern  
24 District of Texas applied to the Article III standing issue.

25 So I say all that to say our preference would be

1 for Your Honor to reject the application of collateral  
2 estoppel and decide the underlying motions.

3 But if Your Honor was inclined to apply  
4 collateral estoppel, we would much prefer that you stay  
5 the case -- or not necessarily the stay the case but hold  
6 the decision in abeyance awaiting the Fifth Circuit because  
7 we, as you would expect, we anticipate winning in the Fifth  
8 Circuit.

9 And if we do, then we would -- if Your Honor  
10 were to apply collateral estoppel and dismiss this based  
11 upon a later reversed decision, then that would just  
12 complicate things in the Third Circuit and sort of drag  
13 things out in an unnecessary way for us to then come and  
14 have to unwind what happened here in Delaware.

15 So that's a long story, a long way to say we  
16 would prefer you to decide it unless you are going to decide  
17 it against us, in which case we would wish you to hold it  
18 abeyance.

19 THE COURT: All right. Got it. You can move on  
20 to whatever you want to address next. Go ahead.

21 MR. BONEAU: Okay. I think that it makes sense  
22 to talk about standing next.

23 The Court, the Third Circuit really, I think --  
24 let me just say, I think that the real issue on standing  
25 here that seems to be the two sides are viewing differently

1 is whether or not the injury in fact arises to the concrete  
2 level as described by the Court in *Spokeo*. Defendants  
3 obviously say that it does not, and we say that it does.

4 Under Third Circuit law, there is really two  
5 ways to get to concrete injury if what you are talking about  
6 is an intangible injury. As I'm sure the Court is aware,  
7 intangible injury is a thing like economic law. And those  
8 are simple. I think that Justice Alito in *Spokeo* mentioned  
9 that is a pretty obvious way to get to standing. But  
10 whenever you have an intangible harm, you don't have a  
11 direct economic harm as a result of whatever it is that is  
12 being complained of. That gets a little more complicated  
13 and it takes a little more nuanced approach.

14 The Third Circuit has identified two means of  
15 getting to that, identifying whenever you have a concrete  
16 harm even though it is intangible. That's the *In Re:*  
17 *Horizon Healthcare Services* case which we cite in our  
18 papers.

19 The first of those is, is the harm that is being  
20 addressed something that has historically been a harm that  
21 you can come to a court in England or America in order to  
22 seek redress upon?

23 And in our view, what we have here is such a  
24 harm because really what we're talking about is an unjust  
25 enrichment type claim. That Mr. Glen isn't bringing suit

1     against the defendants here because they have profited in  
2     a way and made money that he should have been making.  
3     That he should have been the one making the profit on the  
4     commissions related to either the use of a credit card, or  
5     the transaction fees that is associated with the use of a  
6     credit card, or the commissions for booking and staying at  
7     these hotel properties. He is not saying that should have  
8     been his money.

9             What he is really saying, and what it creates a  
10    cause of action for is whenever the defendant profits off  
11    the use of property that has been confiscated by the Cuban  
12    government, then that is wrongful, and therefore a cause of  
13    action lies for that, which is a very similar paradox which  
14    you see for unjust enrichment claim, which is a claim that  
15    has existed in our jurisprudence for many, many, many years.

16            The second test is did Congress create, elevate  
17    a harm through statute that now gives rise, that maybe prior  
18    wasn't such a concrete harm but now has become concrete harm  
19    because Congress elevated it?

20            And the Court, the Third Circuit in *Horizon*  
21    *Healthcare Services* goes to through a pretty extensive  
22    discussion of that but effectively comes to the conclusion  
23    that unless you are talking about a very procedural and  
24    technical violation of a statute, if Congress went to the  
25    trouble of creating a cause of action that lies with the

1 violation of a statute, unless the cause, the claims that  
2 you are actually bringing are technical violations of that  
3 statute, which I think Justice Alito in *Spokeo* references,  
4 for example, if you have a statute related to the  
5 distribution of false information but what was distributed  
6 is an incorrect zip code, that is, it's hard to imagine why  
7 that would give rise all the way to a concrete harm, a real  
8 risk of injury, a real risk of harm.

9 But here that is not what we have. Mr. Glen  
10 hasn't asserted any those types of harm. What Mr. Glen has  
11 asserted is the exact substantive harm that Helms-Burton,  
12 the Title III of Helms-Burton is attempting to address,  
13 which is the trafficking of property that his family once  
14 owned and was taken from him by the Cuban government, by the  
15 defendants in this case.

16 And so in our view, both of the standing tests  
17 are met that the Third Circuit has outlined and under  
18 either, the injury, the claims that Mr. Glen asserts give  
19 rise to an injury in fact.

20 THE COURT: So the defendants say that you've  
21 failed to point to any single tangible way that Mr. Glen's  
22 circumstances would have changed had the defendants never  
23 facilitated the bookings at the hotel. Do you agree with  
24 that or disagree?

25 MR. BONEAU: I agree with that, but that ignores



1 that there is an entire separate section. Sure. So that is  
2 that there is an entire separate section of types of harm  
3 that can arise to concrete that is just, that is described  
4 as intangible, which is where the types of harm that this  
5 case is about fall.

6 These types of case doesn't follow. It doesn't  
7 fall within intangible harm. There is no economic harm to  
8 Mr. Glen because Expedia allowed someone to book on these  
9 hotels, and we haven't alleged that there is.

10 But there certainly are intangible harms here  
11 that give rise to the level of concreteness that has been  
12 described by both the Supreme Court and then subsequently by  
13 the Third Circuit.

14 Unless Your Honor has more questions on  
15 standing, I'd like to turn to the sort of the "acquire,"  
16 the inheritance 1996 issue.

17 THE COURT: That's fine.

18 MR. BONEAU: Okay. Your Honor mentioned a few  
19 of the absurd results that we identified in our briefing,  
20 all of which we think certainly mean that the defendants'  
21 method of analyzing what the term "acquire" and what this  
22 means in the context the entire statute must be wrong.

23 There is one more that I -- that Your Honor  
24 didn't mention that I think is worth pointing out, which is  
25 if a corporation is the entity that is the U.S. national

1 that held this, these claims as of 1995, that corporation  
2 can hold these claims for the next 200 years and never die  
3 and then bring these claims 200 years from now, assuming  
4 that all of the other requirements are met.

5 And so although Mr. Duffy explained one of the  
6 concerns with the way that plaintiffs are reading this is  
7 that multiple generations from now someone might bring a  
8 claim, that ignores the fact that that is exactly what could  
9 happen for corporations because they, unlike humans, aren't  
10 subject to the biological constraints that we are.

11 There is nothing in the statute, nothing in  
12 the legislative history that would suggest that Congress  
13 favored corporations bringing claims versus individuals  
14 particularly.

15 And I'll turn over some of this discussion to  
16 my colleague Mr. Dubbin, but particularly given that  
17 85 percent of the certified claim holders are individuals  
18 and not corporations.

19 The other issue on this concern that many, many  
20 many, many, many years ago or years from now, someone might  
21 be able to bring these claims kind of in perpetuity and that  
22 is really what Congress was trying to address ignores the  
23 fact that there is a limitation, there is a time limitation  
24 in the statute under 6084 that you can only bring a claim if  
25 the trafficking that you are complaining of has occurred

1 within the two years prior to you bringing the claim. So  
2 there is effectively a two year limitations period within  
3 the statute itself.

4 So, for example, whenever Mr. Glen brought these  
5 claims in 2019, any of these -- I'm sorry?

6 THE COURT: You may have heard some background  
7 interference. It was not me, though.

8 MR. BONEAU: Okay. Sorry. Yes.

9 So if any of these entities had ceased their  
10 trafficking in 2016, they would have a defense. That we  
11 haven't been doing this within the last two years. The  
12 statute says you have to bring it within two years of  
13 trafficking, you haven't done that, and so, therefore, you  
14 know, we should be out.

15 So that concern isn't addressed by the statute,  
16 and this 1996 issue is not how Congress was attempting to  
17 address that issue.

18 So I would like to turn it over to my colleague  
19 Mr. Dubbin who as a representative of Mr. Torricelli and  
20 Mr. Burton has a particular insight as to what Congress's  
21 view of this issue was and the enactment of the statute.

22 THE COURT: Sorry. I will have some questions  
23 for him, but first for you, Mr. Boneau.

24 MR. BONEAU: Yes.

25 THE COURT: One of the defense arguments is if

1 "acquired" has the more limited meaning that you argue for,  
2 they say Mr. Glen loses even under that scenario because he  
3 doesn't have a claim. There is no other way he could have  
4 gotten it. Respond to that argument.

5 MR. BONEAU: Thank you. I'm glad you brought  
6 that argument up, Your Honor.

7 That argument assumes that this term "acquired"  
8 really just means the word "had." It includes -- it means  
9 that Mr. Glen's mom and aunt had to have acquired the claims  
10 in the past. But it's a great example of why "acquired"  
11 can't mean what they say it is.

12 Because Mr. Glen and Mr. Glen's mom and aunt and  
13 all the other U.S. nationals and Cubans whose property was  
14 expropriated during the Castro's regime, the revolution had  
15 been 60 years ago, it doesn't make any linguistic sense that  
16 they acquired a claim when their property was taken. Just  
17 like it wouldn't make any linguistic sense to say that a  
18 company whose directors fraudulently misappropriated their  
19 assets acquired a breach of fiduciary duty claim as a result.

20 The claim arose, they have the claim, but they  
21 didn't acquire the claim. You acquire a claim when you go  
22 out into the market and you take assignment of a claim. You  
23 don't acquire a claim just because you have been harmed.

24 You say the claim arose, but you don't say that  
25 you acquired it. Just like you don't say that you acquired

1 -- I have brown hair. I know you can't see it because we're  
2 in the telephonic world that we're in now, but I wouldn't  
3 say that at first I acquired brown hair. I just have it. I  
4 had brown hair.

5 Mr. Glen's mom and aunt didn't acquire the  
6 claims whenever the -- to this confiscated property. They  
7 just had them because the property was confiscated from  
8 them.

9 Similarly, Mr. Glen didn't have to acquire the  
10 claims because he didn't buy. There was no transaction  
11 whereby he transacted his mom or his aunt to acquire the  
12 claim. He now stand in their shoes because they unfortunately  
13 passed and the claim has passed to him through inheritance.

14 But the term -- the use of the "term" acquired  
15 in the way that defendants want to use it makes no sense if  
16 they're saying that not only does Mr. -- does it not make  
17 sense -- not only did Mr. Glen acquire the claim, he  
18 inherited. But if inheritance doesn't mean acquire, then he  
19 must not have it because his mom and aunt acquired it back  
20 in 1960.

21 THE COURT: So do you point to any provision  
22 in the Helms-Burton act that says someone in your client's  
23 position has the claim or are we just supposed to know it  
24 exists?

25 MR. BONEAU: Well, so it's a fair point. And

1       there isn't anything in Helms-Burton. I can't point to  
2       anything in Helms-Burton that makes it explicit that  
3       inheritance is okay, but assignment isn't, or claims trading  
4       isn't.

5               But the legislative history certainly, while  
6       silent on inheritance, as Mr. Duffy referenced isn't silent  
7       on what this particular provision was attempting to address,  
8       which is claims trading after Helms-Burton was enacted.  
9       That is what Congress -- I think Mr. Dubbin maybe is even  
10      better suited to discuss this. But that is what Congress  
11      was attempting to address. So it is unsurprising that  
12      inheritance isn't discussed because Congress didn't, it  
13      didn't occur that inheritance could be the thing that is  
14      even being addressed or discussed as part of this term  
15      "acquired."

16             The thing that people were concerned about was  
17      claims trading, an assigning for value of these claims  
18      after Helms-Burton got enacted. So that is what is being  
19      discussed. Inheritance is discussed not because they just  
20      assumed it was there but because they assumed it wasn't.

21             So unless Your Honor has more questions for me,  
22      I think Mr. Dubbin might be better suited to discuss some of  
23      these issues.

24             THE COURT: Yes, I do have questions for you on  
25      some of the other issues, but why don't we turn it over to

1 him now just briefly on the legislative history.

2 MR. BONEAU: Absolutely.

3 THE COURT: Mr. Dubbin, you can go ahead.

4 MR. DUBBIN: Sure. Thank you very much, Your  
5 Honor. Sam Dubbin on behalf of Dan Burton and Robert  
6 Torricelli.

7 The lack of reference to inheritance in the  
8 statute is a natural consequence of the fact that there is  
9 no way in the world that Congress would have intended to  
10 have a claims process for confiscations that occurred 30 to  
11 35 years previously, where they also put in an opportunity  
12 for the President to suspend the operability of that claim  
13 for God knows how many years.

14 And then what the stated purpose, and this is  
15 stated in the legislative language itself, that the Title  
16 III remedy is to allow U.S. nationals whose property was  
17 confiscated by the Castro regime to receive compensation  
18 as they would be under international law and to deter the  
19 Castro regime from trafficking in that property.

20 The idea that inheritance would be barred when  
21 the claims may not, would not come into effect for at least  
22 35 years from the original confiscation and then in terms of  
23 24 years later makes absolutely no sense.

24 THE COURT: Yes. Let me ask you a few  
25 questions, Mr. Dubbin.

1 MR. DUBBIN: Sure.

2 THE COURT: You do agree that the legislative  
3 history as well as the statute are completely silent on  
4 inheritance; is that right?

5 MR. DUBBIN: On the concept of it. On the word  
6 "inheritance," yes, but not the notion, Your Honor.

7 THE COURT: So where do I find reference to the  
8 notion of inheritance in either the legislative history or  
9 the statute?

10 MR. DUBBIN: Because the fact that the rights  
11 were acquired by individuals prior to March 12th, 1996, on  
12 confiscations that occurred in the early '60s meant that  
13 the likelihood was that they would -- that they could have  
14 died before it would actually be able to be brought to the  
15 Court.

16 And so it's implicit, and I'll address the  
17 implicit right of heirs to bring claims like this separately  
18 if Your Honor doesn't mind, but ... So my answer is it's  
19 implicit in the framework of the statute. I admit it  
20 doesn't say inheritance anyplace, but it is implicit that  
21 claims of this nature would be available to the heirs of the  
22 people for whom the property was actually confiscated.

23 THE COURT: Does any portion of your brief have  
24 any specific reference to this "acquires" provision we're  
25 talking about?



1 MR. DUBBIN: Only in the sense that as I cite  
2 the House Committee Report referencing both (a) (4) (B) and  
3 (a) (4) (C) as being intended to eliminate any incentive that  
4 might otherwise exist to transfer claims to confiscated  
5 properties in order to take advantage of the remedy.

6 THE COURT: Is there a part that says it is in  
7 part designed for that?

8 MR. DUBBIN: Yes, intended in part to eliminate  
9 any incentive that might otherwise exist to transfer claims  
10 to confiscate a property to U.S. nationals, to take  
11 advantage of the remedy. I wouldn't read into that the  
12 intent to disallow people to inherit the claims because as  
13 Your Honor pointed out, the literal reading that the  
14 defendants give to their interpretation, when you look at  
15 subsection C, it says: In the case of property confiscated  
16 on or after March 12th, 1996, the United States national,  
17 who, after the property is confiscated, acquires ownership  
18 of a claim to the property by assignment for value may not  
19 bring an action on the claim under this section.

20 But under the liberal reading, that person could  
21 bring a claim if he inherited it because it only precludes  
22 the bringing of a claim by someone who acquired it by  
23 assignment for value.

24 THE COURT: I understood Mr. Duffy to disagree  
25 and to say that that was not his position, but I

1 understand --

2 MR. DUBBIN: But he can't just state the fact  
3 that that is what the literal language says. So if literal  
4 language applies to (B), it should apply to (C).

5 THE COURT: You have a lot of arguments, and the  
6 plaintiff, too, about the defendant's interpretation would  
7 render the law meaningless or, you know, it is inconsistent  
8 with the broad remedial purpose of the statute to come  
9 out the way the defendants want, but at the same time, of  
10 course, Congress put in the ability of the President to  
11 suspend Title III private rights of action apparently  
12 indefinitely but certainly in six month increments. It  
13 ended up being 20 plus years.

14 Why couldn't this same argument about render it  
15 meaningless be made, you know, about that provision, but we  
16 know Congress put that provision in, so I guess isn't there  
17 a real tension in what you're arguing?

18 MR. DUBBIN: No. Excuse me, Your Honor. No,  
19 that is actually consistent with my argument. Because  
20 Congress understood that the right to sue may not come  
21 into reality for some period of time, whether it was six  
22 months only or several increments of six months. But  
23 they certainly understood that when the time came, when a  
24 President decided to that Cuba was not going to become  
25 democratic and that it was no longer acceptable in whatever

1 diplomatic efforts were being made to bring in a democracy,  
2 that the time for remedy would be brought into effect,  
3 that that remedy should be effective and that it should (A),  
4 provide compensation to U.S. nationals whose property has  
5 been confiscated and (B), be a disincentive to local  
6 corporations to traffic in confiscated property.

7 I believe that is consistent, Your Honor.

8 THE COURT: Isn't there --

9 MR. DUBBIN: That is exactly what happened. It  
10 took 24 years before the remedy was activated.

11 THE COURT: It seemed from like a lot of what  
12 you quoted as the legislative history that what the main  
13 concern of at least the legislators feel you quoted was a  
14 third party or with a third nation coming in and buying  
15 things like the subject property, you know, directly from  
16 the Cuban government or representatives from the Cuban  
17 government and propping up the Castro regime through that  
18 type of direct cash infusion. It just seems like a lot of  
19 it wasn't concerned with the, I don't know, I suppose the  
20 more tangential type of allegation here.

21 Is that an incorrect reading of the portions  
22 that you have highlighted for me?

23 MR. DUBBIN: Yes, Your Honor. I mean, they're  
24 at least co-equal purposes. And the one is stated in  
25 Section 608(1), the actual Congressional findings. The

1 individuals have a right to enjoy property which is  
2 described in the United States Constitution. The wrongful  
3 confiscation or taking of property belonging to United  
4 States nationals by the Cuban government, the subsequent  
5 exploitation of this property at the expense of the rightful  
6 owner undermines the comity of nations, the free flow of  
7 commerce and economic development, and therefore it goes  
8 back.

9 And it continues to go into it's in the  
10 interest of Cuban people that the Cuban government respect  
11 the property rights of Cuban nationals and that the  
12 trafficking and confiscated property provides designated  
13 currency to the Cuban government, and that the purpose of  
14 the law is to protect the claims of United States nationals  
15 who had property wrongfully confiscated by the Cuban  
16 government.

17 Those are coequal purposes, Your Honor. And  
18 they're both outlined in Section 608(1). And I guess I'd  
19 have to go back and re-read the excerpts that I quoted, but  
20 I would -- I would not say that there was a balance to the  
21 points you made rather than compensation to the individual.  
22 And the article by Senator Helms's staff director that I  
23 quote in the brief as well, you know, points that out.  
24 That Senator Helms was uniquely interested in the lack of  
25 international legal opportunities for restitution of

1       confiscated property. And that was why he felt that this  
2       exception was always necessary.

3               THE COURT: All right. I am going to have a few  
4       more questions for Mr. Boneau, but --

5               MR. DUBBIN: Could I? Would you mind? I have  
6       one other point I'd like to make, if Your Honor would  
7       indulge me.

8               Because I was brought this question about, you  
9       know, how do we make sure that heirs are allowed to bring  
10      these claims when you have an ambiguity in the statute?

11              My experience, you know, as an attorney, I've  
12      been representing the Holocaust community for over 20  
13      years seeking restitution of the looted assets. And in  
14      every single one of those cases, it is implicit in the  
15      restitutionary scheme that heirs are entitled to assert  
16      the property rights of their parents and grandparents  
17      because of the passage of time since the original violation  
18      of international law, the original confiscation.

19              I've litigated the Hungarian Gold Train case in  
20      the Southern District of Florida, *Rosner vs. United States*  
21      *of America*. That was a case where the Hungarians and Nazis  
22      had confiscated the Jews property. It was put on a train.  
23      The train was headed for wherever Hitler thought he was  
24      going to retire when the war ended. The Hungarians handed  
25      the train over to the United States Army who do not handle

1 the property in conformity with U.S. and international law,  
2 and the U.S. classified that information for 50 years and it  
3 was brought out in a Presidential Report in 1999.

4 So we filed that case against the United States  
5 for a breach of implied contract for bailment. And the  
6 judge, Judge Seitz in that case, made it clear the U.S.  
7 Government who asserted every single argument you can  
8 imagine against the plaintiffs never argues that the  
9 plaintiffs themselves did not have the same rights as their  
10 parents in the property, that they were teenagers at the  
11 time it was confiscated.

12 There was another reported case called *Bodner v.*  
13 *Banque Paribas* where the Holocaust survivors sued the French  
14 banks for having, you know, confiscated -- participated in  
15 the confiscation of their parents' bank accounts. And in  
16 that case, and, of course, that case was brought in the year  
17 2000, even though the confiscations took place during the  
18 Holocaust over 50 years previously.

19 In that case, the defendants actually did argue  
20 that the survivors, the plaintiffs had no legal basis to  
21 bring the claims which had not accrued to them but it  
22 accrued to their parents, and the Court rejected that and  
23 said many of the relatives of the named plaintiffs died in  
24 the concentration camps in Europe during the Holocaust.  
25 They had resided in France before their detention in the

1 concentration camps. And under French law, Title 2, in  
2 light of possession of all assets, the intestate decedents  
3 vested immediately in the descendants' legatees. Upon the  
4 deaths, the descendants' property passes immediately to  
5 those entitled without passing through the intermediary of  
6 an estate. Courts are involved only in the event of adverse  
7 litigation. Thus, plaintiffs who was parents died in Nazi  
8 concentration camps may properly bring this action in their  
9 own names.

10 So when you have -- and there was, there was a  
11 third case, if I could raise it, Your Honor, because it's  
12 also one that I was involved with. And that is under the  
13 Social Security Act, there is a federal statute that says  
14 that payments made by the Nazi regime to individuals because  
15 of their status as victims of Nazi persecution shall be  
16 disregarded in determining eligibility for the amount of  
17 benefits for services to be provided under federal law or  
18 under federally assisted programs which provides benefits  
19 of services based in whole or in part on need.

20 So there was gentleman in New York whose parents  
21 were both survivors. They had received compensation from  
22 the German government which they put into a trust, and when  
23 they died the trust was inherited by this individual.

24 The Social Security Administration took the  
25 position that because he wasn't the recipient of the

1 payments himself that those -- that corpus was to be  
2 included in his list of assets so that he was then denied  
3 the SSI benefits and he was actually an indigent individual.

4 We brought that case -- so we appealed that case  
5 to the Administrative Law Judge who reversed what the legal  
6 office, SSA wanted to say, wanted to do and he wrote:

7 Principles of statutory construction, federal agency  
8 interpretation and case law, and the Doctrine of  
9 International Comity all support the continuation of the  
10 resources of restitution clause after the death of the  
11 recipient to the immediate heirs.

12 To construe the exemption in favor of the  
13 immediate heirs is to be consistent with the intent of the  
14 act which sought to further the German government's purpose  
15 in making restitution payments to victims of Nazi  
16 persecution, to redress the damage done to the persons they  
17 persecuted and the damage that the devastating and permanent  
18 consequences of the Nazi's persecution inflicted on their  
19 families as well.

20 And in making that analysis, Your Honor, the  
21 Administrative Law Judge cited *Grunfeder vs. Heckler*, 748  
22 F2d 503, Second Circuit case, where the SSA had previously  
23 tried to deny heirs the benefit of reparations payments made  
24 to the parents, and the Court said no. The reason Germany  
25 made those payments had a restitutionary purpose. It wasn't



1 to just give people a basic amount of money to live on. It  
2 was to say you need to be compensated for the harms that  
3 were caused.

4 And so I am suggesting to Your Honor that the  
5 same restitutory purpose with the Helms-Burton Act has  
6 implicit in it that -- and it would also be assumed by the  
7 Congress that these would be able to be inherited. That the  
8 March 12th, 1996 date is not some "arbitration date that  
9 Congress picked in order to stop, to have a limit to claims"  
10 but it was the date, the date the law was passed, and they  
11 didn't want to have commercialization of claims after, you  
12 know, they were, you know, acquired prior to that date.

13 There was certainly nothing about blocking  
14 inheritance that makes any sense under law.

15 THE COURT: All right. Thank you.

16 Mr. Boneau, I want to use the remaining time  
17 for your side to ask you a few questions on some of these  
18 other issues, some of which we might have touched on, but  
19 on scienter, if I were to agree with the defendant's  
20 interpretation of what the statute requires, would that  
21 mean that your client are limited only to trafficking that  
22 occurred after you provided the pre-suit notice to each  
23 defendant?

24 MR. BONEAU: I would say no, Your Honor. I  
25 think that if you were to go with defendants' view of the

1 world, that this scienter becomes easier to establish after  
2 they received the notice letter and they continued to do the  
3 trafficking.

4 But as we outlined in our brief, we still  
5 believe that even if they're right, they still should have  
6 known, if they did not know, that the property that they  
7 were dealing with was confiscated because President Clinton  
8 put everyone on notice in 1996. And there is --

9 THE COURT: Let me stop you. Yes, hold on.  
10 Don't those arguments risk transforming this into a strict  
11 liability statute in eliminating scienter requirement  
12 essentially?

13 MR. BONEAU: No, Your Honor. Because there are  
14 certainly ways in which a potential commercial actor could  
15 end up having profited from commercial activity in Cuba but  
16 not knowingly do so and not intentionally do so.

17 An example would be if -- you know, many of the  
18 hotels are Spanish hotels because of the connection between  
19 Cuba and Spain. So a towel manufacturer from Spain might  
20 make towels and sell them to a distributor in Spain that  
21 in turn sells the towels that it distributes to Melia in  
22 Spain, and then the Melia hotel chain may distribute those  
23 towels to its hotels everywhere, including in Cuba.

24 In that situation, the towel manufacturer,  
25 despite the fact that if you trace the steps far enough, the

1 profit that it made on the sale of its towels is tied to the  
2 fact that that towel is sitting in a hotel in Cuba and being  
3 used by people staying in that hotel.

4 THE COURT: Right. But --

5 MR. BONEAU: That towel manufacturer --

6 THE COURT: On your view of the statute, that  
7 towel manufacturer, if they know and intend that some of  
8 their towels will end up being in Cuba regardless of where  
9 in Cuba, what property, et cetera, they're liable; right?

10 MR. BONEAU: Assuming that they know and intend  
11 that their towels are going to be used at hotels of  
12 properties in Cuba, I think that is correct.

13 THE COURT: Even if it turns out that the  
14 property that the hotels in Cuba is on was not confiscated.

15 MR. BONEAU: Oh, no. Then there would be no  
16 liability because there would be no underlying claim.

17 THE COURT: You would satisfy the scienter  
18 element but no underlying claim, I guess.

19 MR. BONEAU: Correct.

20 THE COURT: All right. On the residential use,  
21 there is, you know, some back and forth on this in the  
22 briefing.

23 If the facts were to show that somebody  
24 actually does live right now at one of these hotels, you  
25 know, they're a long term resident or, you know, there is

1 one condo in the building or the manager lives there  
2 permanently, what would that do to the dispute here?

3 MR. BONEAU: Well, that is an interesting  
4 question.

5 I don't think that it should change anything.  
6 I think that what the residential exception was really  
7 attempting to address was people who live at a place in Cuba  
8 that was confiscated, you know, 60 years ago and now it  
9 houses, this is an apartment complex that houses just Cuban  
10 citizens, and those citizens are provided services. They  
11 have cable, they have Wi-Fi or they have, you know, whatever  
12 the services that are being provided and those services are  
13 ultimately provided by a third-party that exists outside of  
14 Cuba, a Spanish company of some sort.

15 That that company shouldn't be sued for  
16 providing services to Cuban citizens because the efforts  
17 of Helms-Burton weren't to prohibit Cuban citizens from  
18 receiving services or products. It was really addressing  
19 commercial activity that was leading to the propping up of  
20 the Castro regime.

21 So a hotel whose main purpose is to be a hotel,  
22 that also has condos, that shouldn't entirely erase the fact  
23 that the claims that we're talking about are not about sells  
24 of condos to Cuban citizens. The claims that we're talking  
25 about are reserving rooms at a hotel in Cuba or using a

1 credit card at a hotel in Cuba, but regardless we certainly  
2 have pleaded and I don't think the plaintiffs have raised  
3 the potential that there are condos on these properties.

4 And so certainly at this stage, there is nothing  
5 in the record that would suggest that that particular issue  
6 is really before the Court.

7 THE COURT: Okay. On --

8 MR. BONEAU: Although it is.

9 THE COURT: Right. On the lawful travel  
10 exception, at least some of the defendants argue that if the  
11 burden is placed on them, it is then an impossible burden to  
12 meet what makes for lawful travel is very complicated, a lot  
13 of factors when you are traveling to Cuba, and they will  
14 not have access to that information on everyone who books  
15 something through their services or using their credit cards  
16 or whatever. Therefore, that may transform this into  
17 something akin to a strict liability statute.

18 Address that argument.

19 MR. BONEAU: So I don't know that that is true,  
20 first of all. In order to travel to Cuba, my understanding  
21 is there is a checklist that one has to go through,  
22 particularly if you are coming from the U.S., where you have  
23 to identify why you are going there, why is it okay to do  
24 so. And these travel companies whether they collect that  
25 information and keep it or they don't, they certainly have

1 the information related to who it was that used either  
2 their credit cards or who it was that made the bookings  
3 though their website, through their -- to the subject  
4 hotels. And so whether or not they currently own it, which  
5 they may, that doesn't mean that that is the end of the  
6 inquiry. If in fact it's an affirmative defense, they have  
7 to go get the evidence that they need to prove their  
8 affirmative defense. They have to go get it from the people  
9 who they have the information from who those people are if  
10 they don't currently have it.

11 But really the lawful travel defense doesn't  
12 stop at a lawful travel, Right? The term "necessary" is  
13 there. So I just want to -- I know it is not really what  
14 Your Honor asked, but I just want to point out that  
15 regardless of whether or not they establish what happened  
16 was lawful, they can't establish that what they are doing is  
17 necessary as the Third Circuit has interpreted it. And in  
18 fact, the way that Expedia in particular identified this in  
19 their brief, they effectively -- if I can -- if you give me  
20 a moment to get the actual language?

21 The language of the "lawful travel exception"  
22 says: "Transaction and uses of property into the lawful  
23 travel in Cuba, to the extent that such transactions and  
24 uses of property are necessary to the conduct of such  
25 travel."

1           So it's incident to travel, lawful travel to  
2 Cuba, and then necessary to such travel.

3           And Expedia in its brief basically -- and not  
4 basically, it explicitly says, "Necessary and incident to  
5 means related to," meaning that the second cause of that  
6 sentence is irrelevant if in fact related to. Because  
7 otherwise you just -- the cause just says travel or, you  
8 know, uses of property that is related to travel, to the  
9 extent that it is related to travel.

10           So that can't be what it means. Necessary  
11 means what the Third Circuit says it means which is  
12 required. And it is not required that any of the services  
13 that are provided by any of these defendants be used in  
14 order to travel to Cuba.

15           For the booking agencies, you could use Expedia  
16 or you could use Hotels.Com or you could use Travelocity or  
17 you could use any one of these defendants but not all of  
18 them, or you could just go straight to the hotels and book  
19 your reservation. You certainly don't -- it's not needed  
20 that any one of them provide the services that they provide.

21           Similarly, for the credit cards, you could use a  
22 MasterCard, you could use Visa, or you could use neither and  
23 just pay cash.

24           There are multiple alternatives to do what you  
25 need to do.

1           And, finally, there is no need that you stay at  
2       these particular hotels when you are Cuba. You can stay at  
3       many hotels, whether it be at Varadero, or Havana or  
4       anywhere else in Cuba.

5           So although the lawful travel portion of that  
6       phrase could potentially called an evidentiary headache for  
7       defendant, it's sort of beside the point because they can't  
8       prove, they'll never be able to prove what is necessary, so  
9       a travel exception is not going to apply.

10          THE COURT: All right. Then on the election of  
11       remedies point, if I were to permit another amendment to  
12       the complaint, can you, of course, consistent with your  
13       obligations under Rule 11, can you plead in greater  
14       specificity exactly how these properties are not the  
15       properties that were at issue in that earlier case?

16          MR. BONEAU: We can. There are different  
17       properties. I don't view our pleadings that they're  
18       different properties as conclusory, it's just a simple  
19       statement. They're different properties.

20          It's like saying they're different cars.  
21       They're just, they're different pieces of land, the hotels  
22       are different hotels. But to the extent that Your Honor  
23       would like more detail or a map or a picture or something  
24       that more explicitly sort of supports the statement that  
25       they are different hotels, we would be more than happy to



1 do that on amendment.

2 THE COURT: Okay. Thank you very much. I gave  
3 plaintiff about five extra minutes, and we'll add five  
4 minutes to the defendants' time, and we'll turn it back to  
5 them at this point.

6 MR. BONEAU: Thank you, Your Honor.

7 MR. SHANK: Good afternoon, Your Honor. This is  
8 David Shank representing the Expedia entities.

9 There are three very strong reasons for  
10 dismissal that you have heard today. All of them stand on  
11 their own feet, and nothing that plaintiffs have said  
12 undermines any of them.

13 No. 1. The decision in Glen v AA precludes Glen  
14 from relitigating standing in this case, and that precludes  
15 them from maintaining this action.

16 No. 2. Even if Glen had not already litigated  
17 and lost the very standing argument he makes here, he hasn't  
18 suffered injury in fact caused by the defendants alleged  
19 conduct and he doesn't have standing.

20 And, third. Even if Glen could demonstrate  
21 standing, his actions still fail as a matter of law for  
22 multiple reasons, but most notably which is he did not  
23 acquire ownership of the properties before March 12th, 1996.

24 I'd like to start by responding to some of the  
25 arguments that plaintiff's counsel made about a claim for

1 issue preclusion.

2 The standing issue in this case is exactly the  
3 same as a standing issue that Mr. Glen litigated against  
4 American Airlines in the Northern District of Texas. The  
5 conduct is the same.

6 Importantly, the American Airlines case is not  
7 about offering flights. Your Honor asked a question about  
8 that at the beginning. It has nothing to do with operating  
9 flights. It is about the fact that the American Airlines  
10 website, when someone is on there booking flights, offers  
11 the opportunity to book hotels. And, in fact, it does it  
12 through one of the entities of the defendants here, I  
13 believe.

14 So that case is exactly the same as the OTA or  
15 Online Travel Agency case here. It is about booking hotels  
16 that Mr. Glen alleges stand on property that his mother and  
17 his aunt allegedly owned at the time it was confiscated.  
18 This is the same case.

19 The cases in Florida are not the same case.  
20 They are distinguishable.

21 Now, plaintiff's counsel said that those cases  
22 disagreed with the analysis in American Airlines v Glen.  
23 That is not correct.

24 The *Havana Docks* case, for instance, expressly  
25 distinguished Mr. Glen's standing argument from the argument

1 that was being made in that case, and they distinguished  
2 the argument on a very notable basis, which is that Mr. Glen  
3 never owned these properties, and, therefore, he does not  
4 argue that his injury stems from the confiscation of the  
5 properties. He admits that in his brief.

6 The *Havana Docks* case, the plaintiff there owns  
7 the properties at the time of confiscation, and it was on  
8 that basis that the Court in *Havana Docks* distinguished  
9 Glen.

10 So there is no uncertainty in the law that would  
11 justify declining to follow collateral estoppel in this  
12 case. There is no conflict in the law.

13 Now, what there is is a pending appeal, as Your  
14 Honor noted. And Your Honor does have the discretion to  
15 decide to wait to see how that pending appeal comes out in  
16 order to avoid what would be a procedural morass if the  
17 Fifth Circuit did reverse, which we don't think is likely,  
18 but then we had to fix the judgment here because of that  
19 reversal.

20 So, Your Honor does have the discretion to  
21 stay this matter and wait for the Fifth Circuit to we think  
22 affirm the judgment below. But there has not been this  
23 ambiguity in the state of the law on this issue, which is  
24 whether Robert Glen has suffered an injury in fact as a  
25 result of the conduct of defendants who transacted with

1       these hotels in one way or the other.

2               I also want to respond to plaintiff's argument  
3       about the various cases that were filed around the country,  
4       because this issue that plaintiff complains about is really  
5       a problem of their own creation.

6               It is true that there were a number of matters  
7       that were filed against different Expedia entities. And we  
8       agreed for those to be consolidated in Delaware, and that is  
9       not the basis of our argument here.

10              But it is equally true that plaintiff  
11       intentionally, even if you put all the online travel cases  
12       together as they are today, plaintiff intentionally filed  
13       three separate actions across two different courts even  
14       though there is no dispute that every single defendant or  
15       the defendant in the Texas action and the defendants here  
16       are either subject to personal jurisdiction in Delaware  
17       because they're Delaware corporations or conceded to that  
18       jurisdiction.

19              But for whatever reason, the plaintiff wanted  
20       to take a shot at getting one of these cases in Miami and  
21       didn't want to plead the Visa/MasterCard case in the same  
22       cases as the online travel agencies. And, you know, maybe  
23       that wasn't because plaintiff wanted to try and see if he  
24       could get several bites at the apple and see which court was  
25       going to be more favorable, but it is still a problem of his

1 own creation, and he cannot now complain to the Court and  
2 say, well, this really doesn't serve the purposes of  
3 collateral estoppel because this is really his fault.

4 One other point I wanted to bring up on  
5 collateral estoppel is the argument that there are different  
6 allegations about scienter between the American Airlines  
7 case and these cases, but that has no bearing on whether the  
8 standing issue here was already decided in American Airlines  
9 because the scienter question has nothing to do with  
10 standing.

11 The standing question is quite straightforward.  
12 It is simply: Was Glen injured in some concrete way as a  
13 result of the defendants' conduct? And that has nothing to  
14 do with whether or not the conduct was immediately ceased  
15 after receiving the demand letter or not.

16 So the second reason for dismissal. Even if  
17 Your Honor were not inclined to either dismiss the case  
18 based on collateral estoppel or at least stay it until the  
19 Fifth Circuit rules is that even an independent analysis  
20 of standing reveals that Mr. Glen just does not have any  
21 standing here.

22 There is no statutory case, there is no case law  
23 supporting the idea that an injury in fact can be inherited.  
24 Injury in fact required must be concrete and it must be  
25 particularized to the plaintiff.

1                   So I think Mr. Duffy used example of a watch.  
2           If my father, before he passed away, had a watch stolen, I  
3           don't now have some claim against the person who stole it or  
4           the fence who sold it to the ultimate buyer or the pawn shop  
5           because it's not my injury. The confiscation is not Glen's  
6           injury. And, in fact, he admits that.

7                   Nor is the emotional sense of loss he may feel  
8           related to the property a concrete injury under well  
9           established law. Even if he was at the property, even if  
10          he has fond memories of it, the undisputed fact is he never  
11          owned it. He was never the owner of the property.

12                  Now, Glen admits now that he has no tangible  
13          injury, and so plaintiff's counsel made reference to cases  
14          involving intangible injury and then skipped right to the  
15          two different inquiries that the Third Circuit engages in  
16          with intangible hard cases.

17                  But what plaintiff's counsel skipped over was  
18          in those cases, the plaintiff still has to identify an  
19          intangible harm that is separate and apart from the mere  
20          statutory violation, and he has not done so.

21                  I think the most recent case on standing from  
22          the Third Circuit just came out on November 20th. It's  
23          called *Thorne v Pep Boys*, and it is Case No. 20-1540. And  
24          that is a case that dealt with intangible harm. And the  
25          Third Circuit went through and applied those two prongs, but

1     importantly it applied those prongs in assessing an  
2     articulated intangible injury.

3             There, the injury was the risk that the  
4     plaintiff might not be informed of a recall of her tires  
5     because Pep Boys did not register her tires correctly.

6             Now, the Third Circuit found that insufficient  
7     but it could at least engage in the analysis because there  
8     was an intangible harm identified that was separate from the  
9     actual legal cause of injury.

10            Here, there is no such intangible harm.

11            So the statement remains true that Mr. Glen's  
12     circumstances, both tangible and intangible, would be exactly  
13     the same as they are today had the defendants -- had the  
14     Booking and Expedia defendants never offered reservations at  
15     the hotel and had MasterCard and Visa never offered pen and  
16     processing services related to the hotel. He would still not  
17     own the property. He would still have no right to proceeds  
18     from the property, and there would still be hotels sitting on  
19     the property. Nothing tangible or intangible would have  
20     changed, and that is the basis of standing.

21            His argument is purely that Congress created  
22     what he describes as a substantive cause of action or a  
23     substantive right and the defendants have violated that  
24     right, but that is not enough. And the best example is  
25     the Supreme Court's recent case in *Thole*. There, there can

1 be no dispute. Congress expressly granted the plaintiffs  
2 there a cause of action, and the Supreme Court says that  
3 does not matter. The cause of action is irrelevant to  
4 standing analysis.

5 And that makes sense because standing is a  
6 constitutional requirement and Congress cannot just brush it  
7 aside by granting a cause of action to someone who does not  
8 have a concrete injury.

9 So even if there is no issue preclusion or Your  
10 Honor were to find preclusion issue here, there is no  
11 standing and the Court lacks subject matter jurisdiction and  
12 the case can be dismissed on that basis.

13 The last point has to do the legal merits of  
14 these claims, 12(b)(6). And, again, the clearest one here  
15 is the date of acquisition bar.

16 There is no statutory case, there is no case  
17 based on the language of the statute for accepting  
18 inheritance from the date of acquisition requirement. The  
19 plain meaning requires acquisition by March 1996. And  
20 "acquisition" simply means "to get." You must get the claim  
21 before 1996.

22 Now, plaintiff's counsel suggests that that  
23 doesn't make sense for someone who owns the property at  
24 the time of confiscation. But I fail to see why that is  
25 the case. I think someone who owns property when it is



1       confiscated, the moment it is confiscated they acquire, they  
2       get, they obtain a claim to that property.

3               So I think his mother and his aunt, to the  
4       extent they had claims to property, they acquired those the  
5       date of the confiscation.

6               Their interpretation is also self-defeating,  
7       as Your Honor pointed out. If the word "acquire" doesn't  
8       include inheritance, then Mr. Glen never acquired a claim at  
9       all, and therefore he is not a United States national who  
10      owns the claim to the property.

11              The absurd result argument, which I think was  
12      one of the first issues Your Honor brought up, the absurd  
13      result doctrine imposes an extremely high bar that Glen has  
14      not even attempted to reach here.

15              As long as there is any conceivable  
16      justification for the plain meaning of the statute, it is  
17      not an absurd result, and the absurd result doctrine cannot  
18      brush aside the words chosen by Congress.

19              Here, there are multiple conceivably  
20      justifications for the date of acquisition bar. I mean  
21      Congress simply said, all right, as of the date we are  
22      enacting the statute, we are only granting a cause of action  
23      to the people who own the claims today. We were talking  
24      about prior confiscations.

25              The people who own the claims today, you get the

1       cause of action. There will be no more subsequent  
2       transfers, whether for value or otherwise.

3               One of the great justifications for this is  
4       judicial economy, and that would avoid exactly the type of  
5       issues that we would have to wade into if this case were to  
6       proceed beyond the pleadings.

7               Which is, how does someone inherit a claim to  
8       property?

9               What is a claim to property?

10              Is it a real estate interest?

11              Is it a piece of personal property?

12              If it is real estate interest, how do we avoid  
13       the usual rule that rights in real estate are determined by  
14       the law of the jurisdiction where the real estate exists?

15              If it's personal property, how do we avoid the  
16       rule that usually if you inherit a cause of action, there  
17       are rules for how the trustee of an estate or administrator  
18       of an estate must assert that action?

19              So we avoided, Congress avoided all of those  
20       problems by simply saying we're going to freeze it as of  
21       today. Whoever owns the claims today, they get to assert  
22       them, and there will be no subsequent transfers.

23              The other purpose is to prevent the type of market  
24       for claims that plaintiffs talked about. But Congress very  
25       well may have thought, hey, there are a lot of very expensive

1 and clever asset protection lawyers and transaction lawyers  
2 who have come up with all sorts of devices for purporting to  
3 transfer a claim that is technically not an exchange of value  
4 but in reality really is.

5 Congress simply made a choice, that choice was  
6 clear, and that choice precludes them from having a claim in  
7 this case.

8 As for the Holocaust-related cases that amici  
9 counsel talked about, they simply have nothing to do with  
10 the Helms-Burton act. They simply don't involve a statutory  
11 provision that Congress expressly granted to bar claims that  
12 were not acquired by certain date. They also have nothing  
13 to do with French law.

14 Here, we have a clear statutory bar. It has  
15 conceivable purposes and, therefore, it must be applied as  
16 written.

17 Glen may think that that provision, the  
18 application of that provision is unfair, that it's bad  
19 policy, and he may -- maybe he is right. We don't think he  
20 is, but, you know, we can disagree on issues of policy. But  
21 he just can't simply tell the Court he doesn't like the  
22 outcome and ask the Court to rewrite the statute, and that  
23 is exactly what he is asking the Court to do.

24 And that is also exactly what the amici are  
25 asking the Court to do. They are two former Congressmen.

1 Two of, you know, hundreds of people who write the laws of  
2 this country. And while their service is admirable, their  
3 opinions today on what a law that was passed by all of  
4 Congress back in 1996 means are completely irrelevant to the  
5 Court's analysis, especially when there is unambiguous  
6 language, where the statute is unambiguous in its application.

7 Two other quick points on the merits involve the  
8 scienter requirements and the residential use exception.

9 On scienter, unsubstantiated allegations from  
10 plaintiff's counsel in a demand simply cannot put everyone  
11 on -- whoever receives such a notice on notice and render  
12 their prior conduct knowing and intentional as a piece of  
13 property. Nor can it render their continuing conduct  
14 knowing and intentional because they're just unsubstantiated  
15 statements by a lawyer. Were it otherwise, the scienter  
16 requirement would be written out of the statute.

17 You have the same problem with this idea that,  
18 well, if the defendants didn't immediately stop what they  
19 were doing upon receiving the notice, then that means their  
20 post-notice conduct is knowing and intentional.

21 Well, not all conduct can be ceased immediately  
22 anyways, and the defendants may have knowledge specifically  
23 that properties are not confiscated, and they have very good  
24 reason for continuing their conduct, but to allow just the  
25 giving of a notice letter to satisfy the scienter requirement

1 would write it out of the statute.

2 On the residential use exception, the time of  
3 confiscation is what matters, not the current time. This  
4 is not intended to protect Cuban nationals who currently  
5 live on these properties. And we know that because there  
6 is an entirely different exception in the uncertain doctrine  
7 that clearly protects those people, and that is in the  
8 definition of "traffics." The definition of "traffics"  
9 excludes from the definition of traffics transactions and  
10 uses of property by a person who is a citizen of Cuba and  
11 resident of Cuban.

12 That is the provision by which Congress decided  
13 to protect innocent Cuban nationals who are currently living  
14 in property or currently using property from being subject  
15 to these suits, and therefore it cannot also be the same  
16 purpose that underlies the residential use exception.

17 The residential use exception was meant again as  
18 a limit on the number of suits and really type of suits that  
19 are brought under the statute. Because just as we're seeing  
20 in this case, suits based on small pieces of residential  
21 property require a lot of effort by the Court, require a lot  
22 of factual inquiries that are going to be complicated and  
23 frankly fuzzy, and the value of those cases likely is not  
24 going to justify that type of effort, at least that was  
25 Congress's judgment.

1                   THE COURT: All right. Let me ask you some  
2 questions. Let's start with where you finished on the  
3 residential use.

4                   I'm looking at I guess little Romanette 4, which  
5 is what you just pointed me to as protecting Cuban nationals  
6 who may be in residences now. We're in the same place.

7                   MR. SHANK: Yes.

8                   THE COURT: (B) (iv). Let's assume for the  
9 moment that the hotels in question here were apartment  
10 buildings and filled with Cuban citizens who are not  
11 officials to the Cuban government or the ruling political  
12 party. Just help me understand how this provision would  
13 carve out of trafficking, you know, defendants' activities  
14 like the ones here, if you could somehow do them in  
15 connection with an apartment.

16                  MR. SHANK: That exception, Your Honor, would  
17 not carve out the activities of the defendants here. What  
18 it would carve out and prevent would be suits against those  
19 Cuban nationals because they otherwise would be using the  
20 property and therefore under the statute trafficking in the  
21 property.

22                  And so that is what that exception is meant to  
23 do is to protect the nationals. It's not -- it would not  
24 protect the defendants. And that, in fact, is what  
25 proves that the residential use exception has a different

1 application, different purpose, and different scope, which  
2 does include incidentally in this case exempting the  
3 defendants conduct.

4 But really what it is exempting the plaintiff's  
5 -- the property underlying the plaintiff's claim. It is  
6 just saying we're not going to mess with residential  
7 properties. That just doesn't rise to the level that we're  
8 willing to commit the resources of the United States Courts  
9 to handle those claims.

10 THE COURT: All right. Talk, if you would,  
11 about the unjust enrichment analogy. The plaintiff says  
12 that there is a historical parallel there that answers some  
13 of your arguments about injury here.

14 MR. SHANK: Yes, Your Honor. So two points on  
15 that.

16 No. 1. As I already stated, we don't even get  
17 there unless the plaintiff actually identifies an intangible  
18 harm to be evaluated. So in order to see if Congress  
19 intended to elevate or, I'm sorry, if there is a common  
20 law analog 4(A) and a intangible harm, we have to have an  
21 intangible harm that is actually identified. And here,  
22 plaintiff has admitted the confiscation of the property is  
23 not his harm.

24 But the second point is that even if he was  
25 claiming it was, unjust enrichment is not an analog here

1 because (A) that is not what Helms-Burton provides. There  
2 is a sole measure of statutory damages under Helms-Burton,  
3 and it is the entire value of the property trafficked  
4 completely disconnected from the gains of any defendant  
5 trafficking.

6 So under plaintiff's cause of action, and under  
7 the statute, assuming all of the other requirements were  
8 met, plaintiff would prove one booking of one hotel room  
9 and then claim to be entitled to the entire value of the  
10 property, not the profits from that booking. There is no  
11 alternative measure of damages.

12 So Helms-Burton does not reflect unjust  
13 enrichment. It doesn't look like an unjust cause of  
14 enrichment at all.

15 Second. Unjust enrichment is a remedy usually  
16 that can only be asserted by the person who owns the  
17 property, right? So there are restitutionary, all sorts  
18 of restitutionary theories of liability for someone who  
19 has property taken from them. There is constructive trust.  
20 There is some level of disgorgement, but they still have to  
21 have a concrete injury related to the property. Usually it  
22 is ownership of the property or some legal right to the  
23 property, and here there is no such right.

24 There is simply no common law analog for a cause  
25 of action granted to an individual who never owned a piece



1 of property but who nevertheless will get to recover the  
2 value of that property especially when the property is  
3 located in a foreign country whose government does not  
4 recognize even that person's ancestor's ownership right to  
5 that property.

6 THE COURT: All right. What about the corporate  
7 entity that holds the claim and the lack of any statute of  
8 limitations effectively when that is the holder of the claim?

9 MR. SHANK: One. I think that is correct. I  
10 think corporations obviously can live forever. And if they  
11 don't make any subsequent transfers of the claim, which, of  
12 course, would not be permitted, the practical result of the  
13 law that Congress wrote will allow corporations to collect  
14 on claims when frankly the individuals who hold claims may  
15 not live long enough to do so.

16 But that doesn't mean that the entire -- that  
17 the bar that Congress wrote is somehow absurd or can't be  
18 applied. And it doesn't mean that Congress didn't still  
19 have a conceivable justification for making this bright line  
20 rule that has this sort of unintended consequence.

21 Just because they didn't write the perfect law  
22 doesn't mean that the courts are free to abandon the law  
23 they wrote and instead try to write the perfect law. All  
24 that is required to satisfy or to avoid the absurd results  
25 doctrine is to show that there was some conceivable

1 justification for this interpretation. And here, there  
2 obviously was, even if it didn't capture this issue of  
3 corporations.

4 The second thing I will say on that is there are  
5 reasons to believe that corporate -- claims of corporations  
6 will not be as difficult to handle as claims that are going  
7 to be held through chains of succession and inheritance. I  
8 mean some of the claims in Florida, I know the plaintiff's  
9 counsel said it is not really that long of a chain, but I  
10 mean we've had cases in Florida, we're talking about four  
11 generations of inheritance we're dealing with in various  
12 countries.

13 Corporations. One, they have recordkeeping  
14 requirements. They're likely to do things more formally of  
15 what they're doing. But also it is a different animal than  
16 multiple inheritances over time that can be governed by  
17 different state's law, that can have multiple fact issues  
18 as to whether those inheritances are valid. You can have  
19 competing claims of those inheritances, but a corporation  
20 that just continues to hold that same asset for 100 years  
21 doesn't raise those types of complex issues.

22 THE COURT: All right. And, finally, if you  
23 would just talk briefly a little bit more about why the  
24 notice letter doesn't change whether the plaintiff had pled  
25 scienter.

1 I understand a lot of your argument to be I  
2 think more going to evidence, you know, you might have a  
3 reason you don't change your behavior immediately, but why  
4 is it not sufficiently specific allegations of intent and  
5 knowledge that you continued to traffic in these properties  
6 after being told that they were in fact confiscated  
7 properties?

8 MR. SHANK: Because if that were sufficient  
9 fact, then there would be -- scienter would be adequately  
10 pleaded in every single case, which would erase it  
11 essentially as a hurdle, you know, and I think a wise hurdle  
12 to plaintiffs to assert these kinds of cases. Because there  
13 is a provision in the statute, Your Honor, that requires the  
14 sending of that notice 30 days before suit in order to get  
15 the full amount of damages that are permitted under the  
16 statute.

17 So these notices are going to be sent in every  
18 single case. And in most cases, the trafficking behavior  
19 that is being alleged is not something that can just be  
20 immediately stopped the moment there is a notice provided  
21 without breaching all sorts of other obligations, I would  
22 imagine.

23 So it simply would make the scienter requirement  
24 not a requirement at all, at least at the pleading stage.  
25 And I think the Supreme Court and the Third Circuit has made

1 perfectly clear that scienter requirements have the same  
2 pleadings standards as any other requirement, and allowing  
3 a sort of statutorily required demand notice to satisfy the  
4 requirement would simply write it out of the statute.

5 THE COURT: Okay. Thank you.

6 I know we're beyond time but I think Visa wanted  
7 a few minutes. And then, Mr. Boneau, if you want to have a  
8 few words, we'll permit that as well. But first, to Visa.

9 MR. DOMB: Good afternoon, Your Honor. This is  
10 Martin Domb from the Ackerman law firm.

11 I won't take time to go over the various points  
12 made on behalf of all defendants which we agree with. The  
13 case should not survive the main issues of issue preclusion,  
14 standing, and the failure to acquire a claim before the  
15 statutory cutoff.

16 If the Court should reach the alternative ground  
17 of knowing and intentional -- requirement that the conduct  
18 be knowing and intentional, the Court -- Your Honor has  
19 pointed out that one of, Visa stands on a different factual  
20 footing, vis-à-vis all the other defendants.

21 When Visa received its pre-suit notice, it  
22 promptly instructed its acquiring bank, and that is the  
23 bank that actually has the contact and contracts with the  
24 hotels in question, to immediately stop authorizing Visa  
25 charges at the hotels.

1           The plaintiff acknowledged that in its original  
2       complaint, paragraph 68; and in its amended complaint,  
3       paragraph 73. And the plaintiff argued in his reply brief,  
4       at page 22, that MasterCard but not Visa continued to  
5       traffic after receiving the pre-suit letter.

6           Now, why is this significant?

7           Before Visa received that pre-suit letter, it  
8       had no way of knowing anything about Glen's claim. It  
9       didn't know who Mr. Glen was or that he claimed an interest  
10      in property, or that that property was confiscated. And  
11      certainly Visa did not intend to do acts which could be  
12      deemed trafficking in that property.

13          So, now, I believe that on the scienter issue,  
14      the plaintiff hasn't pleaded facts as to any of the  
15      defendants and on that, if the Court reaches it, there  
16      should be a dismissal on that as to all defendants, but  
17      even more so as to Visa for the reasons I stated.

18          Thank you, Your Honor.

19          THE COURT: Thank you very much.

20          Mr. Boneau, did you want a few minutes?

21          MR. BONEAU: Just a couple, Your Honor. And I  
22      won't belabor any points we discussed pretty substantially  
23      here.

24          But just on the residential exception, I think  
25      that Your Honor's question was really getting to the point,

1 which is the definitional issue that the defense counsel  
2 pointed to was meant to protect Cuban citizens, but the  
3 point that plaintiffs were making had nothing really to do  
4 about with Cuban citizens. It was about third parties  
5 providing services or products to Cuban citizens. And that  
6 is what the residential exception, excuse me, that was pled  
7 that defendants have raised, that is what it was meant to  
8 address.

9 And then the other issue is the term "unjust  
10 enrichment" does arise in the congressional findings here.  
11 I believe it is in 6081-8, Congress actually references  
12 unjust enrichment in its findings about what is happening  
13 here in these Helms-Burton, in the Title III cases.

14 Unless Your Honor has any additional questions,  
15 I know we've been on the phone for quite some time now, so  
16 I don't want to just restate things that have already been  
17 discussed.

18 MR. DUBBIN: Your Honor, this is Sam Dubbin.  
19 Could I take 10 seconds?

20 THE COURT: Certainly.

21 MR. DUBBIN: Only to say the argument that  
22 the amici submitted about the absurd result was within the  
23 framework of the natural -- the more natural reading test  
24 that the Supreme Court held was applicable when you have  
25 language that is being interpreted, as it did in the *J.M.*

1 case, February 2019. That the statutory text and context  
2 clearly stated and enacted in legislative findings and the  
3 legislative record lead to the more natural interpretation  
4 that inheritance would not be barred.

5 THE COURT: Okay. Thank you.

6 Mr. AKOWUAH: Your Honor, this is Kwaku Akowuah  
7 for the MasterCard entities. I tried to jump in before  
8 Mr. Boneau. I was on mute. So if you will indulge me for  
9 just 30 seconds?

10 There was, on collateral estoppel, a suggestion  
11 that the allegations against the credit card companies are  
12 different. But if I could refer the Court simply to the  
13 allegations of the complaint as to injury, you will see  
14 identical language in paragraph 83 of the amended complaint  
15 as to the credit card companies and paragraph 170 of the  
16 second amended complaint as to American Airlines, and as to  
17 both the claimed injury as to the wrongful trafficking  
18 period. And really, you know, from a description of the  
19 companies' conduct perspective, the credit card companies,  
20 alleged conduct in processing the transactions, the payment  
21 for the rooms is really just a flip side of the booking  
22 companies' action in reserving the hotel.

23 So as to collateral estoppel, we don't see a  
24 difference and would submit, as has been argued, that  
25 collateral estoppel falls foursquare to the credit card

1 companies as well as the travel companies.

2 THE COURT: Okay. Thank you very much. Thank  
3 you to all counsel for the very helpful argument. I will  
4 take all of this under advisement. If I need anything  
5 further from you, I will let you know. In the meantime,  
6 everybody stay safe, and thank you again for the helpful  
7 argument. We will be in recess. Bye-bye.

8 (The attorneys respond, "Thank you, Your Honor.")

9 (Telephonic motions hearing ends at 2:33 p.m.)

10  
11 I hereby certify the foregoing is a true and accurate  
12 transcript from my stenographic notes in the proceeding.

13 /s/ Brian P. Gaffigan  
14 Official Court Reporter  
15 U.S. District Court  
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